IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-387

JOHN PRESTON ROSENBARGER, JR. - Petititoner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, John Preston Rosenbarger, Jr., respectfully prays that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Sixth Circuit decided June 23, 1976.

OPINION BELOW

The Judgment and Order of the United States Court of Appeals for the Sixth Circuit is reported as *United States* v. *Rosenbarger,* 536 F. 2d 715 (6th Cir., 1976).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on June 23, 1976. This petition for a Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under authority of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. **Whether the Information Furnished to the Judicial Officer Issuing the Search Warrant by Louisville Police Detective Ken Mooney Was Legally Sufficient and Reliable to Support the Issuance of a Search Warrant.**

II. **Whether the Searching Officers Had a Right to Seize the Weapons Charged in the Indictment Since These Weapons Were Not Named in the Search Warrant and Bore No Reasonable Relationship to the Items Sought to Be Seized.**

III. **Whether the Lapse in Time of Twenty-Two (22) Days Between the Alleged Sale of the Guns and Chain Saw to the Petitioner and the Execution of the Search Warrant Required the Detectives to Independently Corroborate the Accuracy of the Information Before Applying for a Search Warrant.**

IV. **Whether 18 U.S.C., Appendix §1202(a)(1) Is an Unprecedented Extension of Federal Power and Therefore Unconstitutional.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The statute which is involved here is 18 U.S.C. §1202(a)(1).

STATEMENT OF THE CASE

On or about February 20, 1975 John Preston Rosenbarger, Jr. was arrested by Agent Charles Hill, Bureau of Alcohol, Tobacco and Firearms and charged with violating 18 U.S.C., Appendix §1202(a)(1), i.e., willfully and knowingly possessing firearms after having been convicted of a felony. Thereafter, the petitioner was indicted by the Grand Judy on three (3) separate counts alleging violations of the above statute.

The guns charged in the Indictment herein were found at Rosenbarger's home as a result of the execution of a Search Warrant on January 8, 1975. The Search Warrant was based upon an Affidavit sworn to by Detective Ken Mooney, also on January 8, 1975. Mooney's information for the warrant had been com-

municated to him by Commonwealth Detective Glen Wood of Bowling Green, Kentucky, who had advised that he had received information from an informant, JoAnn Martin on January 6, 1975. The Martin woman had given a written statement to Wood on that date. It later developed that this statement was the second rendered by Ms. Martin, the first having been destroyed after she acknowledged it to have been untrue (Transcript of Proceedings, pp. 12-13). In subsequent testimony of Detective Wood, it further developed that Ms. Martin had provided yet another statement to that officer dated December 27, 1974 in which she used the name of JoAnn Willhelm. Detective Wood also introduced three (3) Warren County, Kentucky theft reports which purported to be the subject matter of the Search Warrant.

After his arraignment on the Indictment, the petitioner filed a Motion to Suppress; a Motion for a Bill of Particulars; a Motion to Declare Statute Unconstitutional; and a Motion for Any and All Exculpatory Materials and Information. The District Court, by Order, overruled Rosenbarger's Motion to Declare 18 U.S.C. §1202(a)(1) Unconstitutional, and, at a Hearing on June 5, 1975, the District Court overruled his Motion to Suppress the fruits of the search.

After the Hearing of June 5, 1975 involving the petitioner's Motion to Suppress, Rosenbarger executed his Affidavit and Waiver of Trial by Jury and on June 13, 1975 Rosenbarger entered into a Stipulation of Facts in which he acknowledged that these weapons were found in his home and that they had traveled

in interstate commerce since they had not been manufactured in the State of Kentucky; and that he had been convicted of the felony of Possession of Burglary Tools in 1968. However, Rosenbarger, in that instrument, particularly contended that the District Court erred in its findings of June 5, 1975 overruling his Motion to Suppress and to declare 18 U.S.C. Appendix, §1202(a)(1) unconstitutional. The Stipulation allowed the District Court to find the petitioner guilty as a matter of fact and law, which Order was entered on June 13, 1975.

STATEMENT OF THE FACTS

The following information represents the important facts in this case. On January 8, 1975, at approximately 4:00 p.m., Warren County, Kentucky Commonwealth Detective Glen Wood appeared at the Louisville Police Headquarters and talked with Louisville Detective Ken Mooney about items of property stolen from the Bowling Green, Kentucky area, which property Wood believed to be in the Louisville area. Wood indicated to Mooney that the information about the stolen property had been provided from Ms. JoAnn Martin, who had signed a statement (Transcript of Proceedings, pp. 27-32). However, according to Detective Mooney, Wood did not provide a copy of that statement for Mooney's perusal or benefit (T.P., p. 30). Based upon the information supplied by Wood, Detective Mooney prepared an Affidavit and Search Warrant for Rosenbarger's house and took both to the home

of Louisville Police Court Judge Shobe, who then signed the warrant for the search of Rosenbarger's home (T.P., pp. 32-34). Even though Detective Wood was available to go to Judge Shobe's home with him, Mooney went alone (T.P., p. 32). Nor did Detective Mooney ask to be furnished any serial numbers of the weapons or chain saw which were to be the subject of the search (T.P., p. 36).

The Affidavit and Search Warrant indicated that the search was for the following property: One 12 gauge double barrel Ithaca shotgun, One .22 magnum rifle Brand Mossberg, One Homelite chain saw, assorted hand guns, various makes and calibers. Marijuana and/or narcotics or dangerous drugs. However, the statement of JoAnn Martin mentions "1 Power saw yellow—with the name McCullen (sic) 250 on it, 1 color TV 21 in. console with leg that screw (sic) off legs. Three shot guns. I think they were a 12 Gage (sic) I don't remember the other one . . ." There was no mention in the Martin statement about handguns, marijuana, narcotics or dangerous drugs.

The Search Warrant was executed in the early evening of January 8, 1975 upon the petitioner's wife (T.P., p. 44). Rosenbarger was not home at the time (T.P., p. 43). The officers found a Titan .25 automatic, a Western Derringer .357 and a .45 Commando Mark III and a McCulloch chain saw, and some pills described as positive amphetamines (T.P., pp. 42-44). With regard to the pills, Detective Mooney could not recall whether they came from Ms. Rosenbarger's purse or not (T.P., p. 45). In any event, the officers

did not find a 12 gauge Ithaca shotgun, a .22 Mossberg rifle or a Homelite chain saw, as named in the Search Warrant.

During the course of the Hearing on petitioner's Motion to Suppress, Detective Mooney acknowledged that neither he nor the other officers who participated in the search of Rosenbarger's home could have identified any of the items sought in the search warrant as being stolen items. He stated that they knew of no serial numbers or identifying marks for these items, but simply intended to "run them through a computer" if they found any items (T.P., pp. 37-38). Mooney admitted that he intended to justify the search by what was subsequently found (T.P., p. 39). On cross-examination Mooney advised that he did receive theft reports from Wood about stolen property sometime after the search warrant had been executed (T.P., p. 42). However, these theft reports contain only a general description of stolen items and not information which would particularly describe a specific item.

At the Hearing, Detective Wood testified that the information that he had given to Detective Mooney was from his memory because he did not have his file with him (T.P., p. 60), and that was the reason for the discrepancies in the search warrant (T.P., p. 61). Further, Wood testified that his information about stolen chain saws was of a general or hearsay nature because "we've had numerous chain saws stolen, I mean, over a period of a while" (T.P., p. 63). On direct examination Wood testified that he would need

the theft victims to identify the stolen property (T.P., pp. 64-65, 67-69). He further admitted that he had not made any follow-up investigation to try to obtain more specific information about the stolen property, even though the thefts had occurred two and three months before the search warrants were sought (T.P., pp. 68-69).

During the course of her examination at the Suppression Hearing, JoAnn Martin testified that she had provided Detective Wood with conflicting statements concerning her involvment with break-ins in the Bowling Green, Kentucky area (T.P., pp. 12-13). She further testified that she was not familiar with guns at all, and did not know any brand names (T.P., p. 19). Her testimony was that she and her husband had come to Louisville and sold three guns and a saw to a man named Johnny Rosenberg (sic) for $100.00 (T.P., p. 18). These items were allegedly stolen by Ms. Martin, her husband, and another in the Bowling Green, Kentucky area (T.P., p. 21). As previously stated, Ms. Martin gave yet another statement to Detective Wood on December 27, 1974, utilizing the name JoAnn Willhelm.

REASONS FOR GRANTING THE WRIT

The Fourth Amendment of the Federal Constitution commands that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

It is John Preston Rosenbarger, Jr., contention that this specific provision of the Federal Constitution was violated by officers of the Louisville Police Department when they sought the search warrant for his home and when they subsequently searched the home and seized the weapons which became the subject matter of the Indictment herein.

I. Whether the Information Furnished to the Judicial Officer Issuing the Search Warrant by Louisville Police Detective Ken Mooney Was Legally Sufficient and Reliable to Support the Issuance of a Search Warrant.

As the Fourth Amendment commands, people have a constitutional right to be secure in their homes against unreasonable searches and seizures. If the home is to be violated by a search, that search must be based upon probable cause and a warrant must particularly describe items sought to be seized. In this case there was no particular description of the property sought to be seized even though particular descriptions could have easily and reasonably been obtained by the government officials involved in the search.

Obviously, the Bowling Green, Kentucky area had experienced a number of burglaries in the fall of 1974 as evidenced by the break-in reports of the Warren County Sheriff's Department. And apparently JoAnn Martin and others had participated in some of the

burglaries, since she provided statements acknowledging her theft activities. However, neither the theft reports nor her statements contain anything other than general information about items purportedly stolen. Certainly, JoAnn Martin would not have been expected to take down, let alone provide, serial numbers for the stolen items in question. However, it would seem that good police procedure would dictate that serial numbers be obtained from the victims of crime for those items that are normally serialized. Also, information should be sought concerning any specific identifying marks on the property, so that it could easily be identified if found either through chance or investigation. Yet in this case no such effort was made by law enforcement officers.

On January 8, 1975 Detective Glen Wood decided to combine his daughter's hospital examination in Louisville with an investigation concerning the alleged sale of certain Bowling Green area stolen property (T.P., p. 81). Even with that planning, he did not bring his information file with him (T.P., p. 60). Detective Wood, after the hospital visitation, went to Louisville Police Headquarters and met with Detective Ken Mooney, where he discussed the information that he had obtained from JoAnn Martin. From an examination of the testimony adduced at the Suppression Hearing, Wood supplied Mooney with information from Wood's memory and not from any official documents (T.P., pp. 30, 32, 35, 36, 41, 42, 60) although Wood thought he gave Mooney a copy of the December 27, 1974 statement of JoAnn Martin (T.P., p. 58)—a

conclusion not borne out by any of Mooney's testimony. As a consequence of this meeting on January 8, 1975, an Affidavit for Search and a Search Warrant was prepared for Judge Shobe's signature.

A review of the Affidavit and Search Warrant clearly shows that the descriptions of the items sought were very general, and would defy specific identification. No serial numbers were listed for the weapons or the chain saw, although they could have been obtained from the owners if a little effort had been made by either Detective Wood or some other police official.

Further, the Search Warrant and Affidavit did not comport with the statement given by JoAnn Martin, which statement was offered in the sworn Affidavit as the basis for the Search Warrant. Ms. Martin's statement of January 6, 1974 (sic) contained the allegation that her husband had sold three (3) shotguns and a McCullen (sic) chain saw to Johnny Rosenburg (sic). The Affidavit and Search Warrant said one shotgun, one rifle, one Homelite chain saw and assorted hand guns. Obviously, Detective Wood had completely misrepresented JoAnn Martin's statement to Detective Mooney.

Even though there was a material misrepresentation of fact by Wood, the information in the Affidavit and Search Warrant itself were completely devoid of the particular description requirements of the Fourth Amendment. Both detectives admitted in their Suppression Hearing testimony that they could not have identified the items listed in the search warrant if they

had been found at Rosenbarger's home (T.P., pp. 37-38, 64-65, 67-69).

In *United States* v. *Gray,* 484 F. 2d 352 (1973), p. 354, the United States Court of Appeals for the Sixth Circuit discussed the requirement for specific descriptions, and stated that

> The Fourth Amendment requires that warrants particularly describe the things to be seized. The specificity of description requirement furthers the goal of privacy which the Fourth Amendment was designed to protect by insuring that even when a search is carried out pursuant to a warrant, the search is limited in scope so as not to be general or exploratory.

And that Court stated further, citing *Marron* v. *United States,* 275 U. S. 192, 196, 48 S. Ct. 74, 76, 72, L. Ed. 231 (1927) at page 354, that

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Mr. Justice Butler writing for the Court, in *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931), at p. 158, stated

> . . . The first clause of the Fourth Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures shall not be violated.' *It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken.* Gouled v. United States, 255 U. S. 298, 307, 41 S. Ct. 261, 65 L. Ed. 647. The second clause declares: 'And no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.' *This prevents the issue of warrants on loose, vague or doubtful basis of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union.* Agnello v. United States, 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 ALR 409. *The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted* . . . (Emphasis added)

It is Rosenbarger's primary contention that the Search Warrant at issue is a general warrant of search that does not even achieve a kinship to the type of warrant approved by our Fourth Amendment. While Mr. Justice Stewart particularly excluded weapons from his opinion in *Stanford* v. *Texas,* 379 U. S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965), he did provide an

elaborate history of the amendment and its purposes, concluding at p. 512, that general warrants are constitutionally intolerable and

> . . . the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant . . .

At the Hearing on the petitioner's Motion to Suppress, nearly five (5) months after the search warrant was executed, both Detectives Mooney and Wood did testify that Wood had advised that a television set, supposedly sold by the Martins, had been recovered from another person earlier that day (T.P., pp. 30-82). Rosenbarger submits that if this information is true, in fact, that this recovery could be considered as corroborative of the Martin statement.

However, petitioner believes that it is at least very curious that this specific information was not stated in the Affidavit for Search and the Search Warrant itself. It appears in neither, and yet it would seem to be an exceptionally material and positive consideration for any application to a judicial officer for so important a matter as a search warrant. Certainly, if true, the information could be one of the more positive justifications for the issuance of such a warrant. But the information, for some reason, was not included for the Judge's consideration.

Spinelli v. *United States,* 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969) stands for the absolute proposition that informant information provided to a judicial officer for purposes of securing a search warrant must offer the judicial officer a reason to conclude that the informer and information is reliable and further that a reviewing Court can only consider the information which was brought to the judicial officer's attention.

The *Spinelli* case, *supra,* really reaffirmed this Court's earlier rulings in *Nathanson* v. *United States,* 290 U. S. 41, 78 L. Ed. 159, 54 S. Ct. 11 (1934); *Johnson* v. *United States,* 33 U. S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948); *Giordenello* v. *United States,* 357 U. S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245 (1958); *Ker* v. *California,* 374 U. S. 23, 10 L. Ed 2d 726, 83 S. Ct. 1623 (1963); *Jones* v. *United States,* 362 U. S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725, 78 ALR 2d 233 (1960); *Aguilar* v. *Texas,* 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964) and other cases which involve lengthy discussions about constitutional requirements for obtaining search warrants.

Anticipating that some moment might be attached to Rosenbarger's "reputation," as testified to by Detective Wood at the Suppression Hearing (T.P., pp. 74-75), the petitioner calls the Court's attention to the language in *Spinelli, supra,* at p. 588, wherein the Court renounced the reputation theory as being "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision (citing *Nathanson, supra*)."

In the perspective of these cases it seems clear that far more specific information should have been provided Louisville Police Court Judge Shobe by Detective

Mooney. This information should have included better descriptions of the items sought by the warrant, as well as information about the earlier recovery of the television set, if that information was, in fact, true.

Equally curious is the fact that it was Mooney, not Wood, who sought the Search Warrant. Even considering the fact that Wood was from another jurisdiction, it would certainly seem logical that he would at least accompany Mooney to the Judge's home, rather than sit around headquarters awaiting Mooney's return (T.P., pp. 32, 68). Perhaps, this fact represents a sad commentary on the ease with which search warrants are issued by Louisville Police Court Judges.

The Police Court Judge who signed the warrant authorizing the search of Rosenbarger's home should have required that more specific information be provided in the Affidavit and in the Warrant. The instrument that he executed called for the seizure of items which could not have been identified, even if found. The petitioner contends that the defect in the warrant is patent and fatal and, therefore, the subsequent search and the seizure of weapons was illegal and consequently should have been suppressed from use in evidence by the District Court.

II. Whether the Searching Officers Had a Right to Seize the Weapons Charged in the Indictment Since These Weapons Were Not Named in the Search Warrant and Bore No Reasonable Relationship to the Items Sought to Be Seized.

The basis for the search warrant issued to Detective Ken Mooney was for the purpose of recovering items, allegedly in Rosenbarger's possession, that were fruits of burglaries in the Bowling Green, Kentucky area (T.P., p. 29). Even though Detectives Mooney and Wood had no serial numbers with which to identify Ithaca shotguns, Mossberg rifles and Homelite chain saws, they, at least, knew that they were looking for these brands. The fact that other items were mentioned in the search warrant under the general headings of "assorted handguns, various makes and calibers, Marijuana and/or narcotics or dangerous drugs," is not particularly meaningful since there is nothing in the Record to support a reason to search for these general items. None of JoAnn Martin's several statements support a request for a search of these items. Consequently, petitioner believes that it is safe to assume that this surplusage was added for the benefit of the Police Court Judge to help insure that the search warrant would be issued.

In any event, brand name items, even without the serial numbers included, sought by the search warrant were not found. However, during the course of the search the officers did find three (3) other guns. There was nothing illegal, per se, about the weapons that were found. Nor, does the record reflect that they were

necessarily in the possession of a particular person at the time of the search. Rosenbarger was not home at the time of the search but his wife was (T.P., pp. 43-44). Yet the police seized the weapons during the course of the search and, in turn, notified agents of the Alcohol, Tobacco and Firearms Agency of their finding. Those agents had not participated in the search of the Rosenbarger premises (T.P., pp. 6-7).

Here, again, the petitioner relies upon the authorities heretofore cited, and particularly considering the decision in *United States* v. *Gray, supra.* At the time of the seizure there was nothing immediately apparent to the seizing officers that the guns "were 'evidence incriminating the accused'." (p. 355). As the Court stated in *Gray, supra,* the guns were not contrabrand, nor was there any knowledge that the guns "were evidence of any other crimes" (p. 355). Moreover, Detective Wood was present during the search of Rosenbarger's home (T.P., p. 68) and, relying upon his "memory," knew or should have known that these three (3) guns were not part of any Bowling Green case in which he was involved.

It seems obvious from the facts of this case that utilizing these three (3) guns as the basis for a criminal charge against Rosenbarger came as an afterthought to the Detectives. Consequently, their use as evidence in a criminal prosecution should be disallowed under authority of *United States* v. *Gray, supra, Marron* v. *United States, supra,* and *Go-Bart Importing Co.* v. *United States, supra.*

III. Whether the Lapse in Time of Twenty-Two (22) Days Between the Alleged Sale of the Guns and Chain Saw to the Petitioner and the Execution of the Search Warrant Required the Detectives to Independently Corroborate the Accuracy of the Information Before Applying for a Search Warrant.

In the statement given by JoAnn Martin on January 6, 1975, she advised Detective Glen Wood that she and her husband, Leland Martin, had sold three (3) shotguns and a McCullen (sic) chain saw to Rosenbarger on December 18, 1974. Then on January 8, 1975 Detective Glen Wood appeared at Louisville Police Headquarters and discussed the case with Detective Ken Mooney (T.P., p. 29). Thereafter, Mooney sought out Police Court Judge Shobe, at the Judge's home, for execution of the Search Warrant (T.P., p. 32). As discussed in the previous issues, Detective Wood relied upon his memory to provide the information for the warrant. Mooney admits that he simply took Wood's information, without further corroboration (T.P., p. 32).

As discussed in the previous issue, Detectives Mooney and Wood testified at the Suppression Hearing about the recovery of a television set earlier on the day of January 8, 1975, which recovery was allegedly based upon information supplied by JoAnn Martin. Admittedly, if true, this "recovery" could be corroborative. However, reviewing the four corners of the Affidavit, there is nothing there to inform the judicial officer of this "fact."

Consequently, petitioner believes that the judicial officer, considering the Affidavit for Search and the Warrant for Rosenbarger's home, is faced with the problem of signing a Search Warrant for small, movable items alleged to have been received by the petitioner twenty-two (22) days before the warrant was requested. Rosenbarger believes that the Police Court Judge should have required much more corroboration concerning the probability of the items being at his home before signing the warrant.

Sgro v. *United States,* 287 U. S. 206, 53 S. Ct. 138 (1932) addressed the issue of timeliness regarding search warrants. This case involved the reissuing of a warrant that had been issued twenty-one (21) days before. Mr. Chief Justice Hughes, writing for a seven member majority, states, at p. 140, that

> . . . The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual . . . While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, *it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.* Whether the proof meets this test must be determined by the circumstances of each case (Emphasis added).

United States v. *Neal,* 500 F. 2d 305, (10th Cir., 1974) is a case with facts somewhat similar to this

matter. In *Neal, supra,* agents of the Federal Bureau of Investigation were furnished information about Neal from an informer who was a participant in a car theft ring. The informant advised the agents that Neal had numerous articles from stolen automobiles in his home. Approximately three months after receiving the information, the agents applied for search warrants for Neal's home and garage.

The *Neal* Court, at p. 308, after discussing probable cause for the issuance of search warrants, commented that information from participants "carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search [citing United States v. Harris, 403 U. S. 573, 583, 91 S. Ct. 2075, 2082, 29 L. Ed. 2d 723 (1971)]." The Court further wrote that "We are satisfied that the facts stated in the affidavits, *if they were not too remote,* were adequate to support a finding of probable cause for the issuance of the warrants (citing cases)" (Emphasis added).

Addressing the remoteness question, the *Neal* Court, at p. 309, concluded that

> . . . We are convinced that the remoteness of the information relied upon is such that it will not support the issuance of a valid warrant. The Fourth Amendment contemplates that probable cause for the issuance of a search warrant must exist at the time the search is sought to be made. Probable cause existing at some time in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continued to the time the Affidavit was filed. (Supporting citations omitted) . . . There is no reference

> in the affidavits as to what occurred during the three months after the discontinuance of Green's participation and there is no information from which it could be inferred that the operation continued or that the material sought to be recovered remained on the described premises. We find no case which has held that a valid search warrant could issue under these circumstances.

United States v. *Nichols,* 89 F. Supp. 953 (W. D., Ark., 1950) involved a case where the information supplied was twenty-one (21) days old. There the Court, at p. 955, states that "the results of the search are, of course, immaterial and may not be considered. (Citing Byars v. United States, 273 U. S. 28, 29, 47 S. Ct. 248, 71 L. Ed. 520)."

Then, at p. 956, the *Nichols* Court writes that

> In the instant case there was a lapse of 21 days from the date of the observance by the affiant and the date of the Affidavit, and while the Court realizes that this in itself is not conclusive of the question, for it is not mere lapse of time that condemns an affidavit and search warrant but lack of probable cause, yet, it is a proper element for consideration in resolving the question. And, the greater the lapse of time the more important it becomes.

The petitioner urges that the circumstances of this case, even placing the Martin statement in its most favorable position for the government, requires that this Court to conclude that the lapse of time between the alleged "sale" of December 18, 1974 and the application for search of January 8, 1975 is fatal, in and of itself, to the validity of the search warrant issued on that later date.

IV. Whether 18 U.S.C., Appendix §1202(a)(1) Is an Unprecedented Extension of Federal Power and Therefore Unconstitutional.

The petitioner, at the outset of this issue, wishes to advise this Honorable Court that he recognizes and appreciates the fact that the Court has had this particular issue before it on other occasions, though perhaps in other forms, and further that in his own jurisdictional circuit the matter is res judicata, e.g., *United States* v. *Brown,* 472 F. 2d 1181 (6th Cir., 1973); *United States* v. *Day,* 476 F. 2d 562 (6th Cir., 1973) and *United States* v. *Bush,* 500 F. 2d 19 (6th Cir., 1974). We further recognize that the tide of opinions from most other circuit jurisdictions have also upheld the constitutional validity of the statute being questioned. Yet, hopefully unlike Don Quixote, the petitioner believes that the statute is subject to constitutional question because he believes it to be, in fact, "an unprecedented extension of federal power." *United States* v. *Bass,* 434 F. 2d 1296, 1300 (2d Cir., 1970). Like Mr. Justice Blackmun, the petitioner wishes that the Supreme Court had addressed itself to the constitutional question in *United States* v. *Bass,* 404 U. S. 336, 30 L. Ed. 2d 488, 501, 92 S. Ct. 515, 527 (1971).

To be sure, the congressional intention of the statute can be appreciated, if not by the petitioner, at least,

by his counsel. Few people in our society can really favor the indiscriminate possession, display and/or use of weapons, and the like. And perhaps weapons in the possession of convicted felons, and others defined by the statute should be more cause for concern, than possession by otherwise "normal" citizens.

However, discarding, for argument purposes at least, the sociological aspects of the statute, there seems to be a more fundamental, and hopefully more academic question involved. When does the interstate commerce nexus ever stop as it relates to this statute? From a reading of the statute itself and the majority of the Court decisions, a reader must conclude that Congress and the majority of Courts intend that a weapon will always be in the mainstream of commerce, regardless of where, and for how long it comes to rest.

Rosenbarger suggests that such an interpretation is unreasonable, particularly in light of some of the other subject matters of federal legislation. For example, it is a federal crime to steal from an interstate shipment (18 U.S.C. §659). However, after an item reaches its destination, it looses its interstate character or designation and is no longer considered part of interstate commerce. As an example, a refrigerator manufactured in Louisville, Kentucky for delivery in Cincinnati, Ohio is in interstate commerce during its course of transportation from the manufacturer to the wholesale distributor. However, after the refrigerator is delivered to and accepted by the wholesaler and is readied for local delivery to a retailer, it is no longer considered as being in interstate commerce. A theft

at that point is a matter for local authorities, rather than federal authorities.

An automobile, manufactured in Detroit and shipped to Louisville is no longer in the stream of commerce, for federal law purposes, once it has arrived in Louisville and is assigned to a local dealer for sale. Consequently, a theft from a local dealer would not involve a federal violation of law, unless the auto were taken across state borders (18 U.S.C. §2312).

Other examples can be found through a perusal of Title 18. Without belaboring the point, it seems sufficient to state that these examples show a realistic recognition by the Courts that interstate commerce does have both a beginning point and an ending point, and that because something was once in interstate commerce does not mean that it will always be so. If that were the case, then most thefts from homes or businesses would be federal crimes rather than local crimes. If the former were true, the federal courts would be inundated with matters now processed through local, state and municipal courts.

In *United States* v. *Maze,* 468 F. 2d 529 (1972); 414 U. S. 395, 38 L. Ed. 603, 94 S. Ct. 645 (1974) this Court and the Sixth Circuit Court of Appeals held that the use of a stolen BankAmericard in three states was not a violation of the mail fraud statute, denounced by 18 U.S.C. §1341 because it was not shown that the use of mails for collection by defrauded merchants contributed to the execution of the accused's scheme. However, this petitioner urges that the *Maze* case *supra,* factually seems to have more direct contact with

interstate commerce than his matter. In *Maze, supra,* it was the fact that interstate communication, in some form, was used that called attention to fraudulent obtaining of goods and services. Yet this Court and the Sixth Circuit Court should not or would not fit that case within interstate commerce theories.

Realistically, practically and academically, then, how does a weapon that has completely ceased movement within and without state boundaries still remain in interstate commerce? Liberally paraphrasing Mr. Justice Blackmun in *Bass, supra,* p. 525, the petitioner believes that a dog should be called a dog, a cat a cat, and a cow a cow. If, by earlier example, a refrigerator, a car and other chattels, at some fixed point, cease to be in interstate commerce, then why not a gun? Actually, in most instances a gun, too, ceases to be in interstate commerce at some fixed point, since no one is prosecuted federally for stealing a gun from a home. Only if it happens to be found in the possession of a convicted felon, or some other person categorized by 18 U.S.C., App. 1202 is there a federal prosecution. What about a convicted felon in possession of a stolen refrigerator? Congress, petitioner believes, seems to have hung its interstate hat on the thinnest of reeds when it enacted this statute, and yet most of our Courts seem bent upon perpetuating the interstate fiction.

Like the Second Circuit in *Bass, supra,* the petitioner has, what he believes to be, very reasonable, and hopefully rational, doubts about the statute's unprecedented intrusion and incursion into legal areas that have, heretofore, been under the jurisdiction and do-

minion of local or state governments. The quarrel should not be with the purpose or motive of the legislation. That is understandable and should be appreciated. But, petitioner believes that the statute cannot be "hooked up" to the Interstate Commerce Clause to give it viability, when a similar statute with any other subject matter would surely fail to pass constitutional muster and court scrutiny.

Barrett v. *United States,* —— U. S. ——, 46 L. Ed. 2d 450, 96 S. Ct. 498 (1976) is a matter somewhat analogous to the petitioner's case. Rosenbarger, not unlike Mr. Justice Stewart, who was joined in the dissent in *Barrett, supra,* by Mr. Justice Rehnquist, does not believe, as a matter of law, that he was guilty of any "federal statutory offense of which he stands convicted" (p. 506). There was no evidence what-so-ever that Rosenbarger participated in any interstate activity involving the guns which were the subject matter of the Indictment.

CONCLUSION

The Constitution of the United States, through its Fourth Amendment, provides persons with fundamental protections from unreasonable searches of their houses. That Amendment further provides that probable cause and particular information must be provided to a magistrate before a warrant of search may issue for that house. John Preston Rosenbarger, Jr. submits to this Honorable Court that the authorities involved in this case had neither the requisite probable cause or particular information sufficiently necessary for the issuance of the search warrant for his house. As argued in this petition, and supported by the testimony of the officers, the authorities were going to justify the search of the Rosenbarger premises by what they found during the search. No item defined in the warrant could have been identified by the officers had they, in fact, found such items. Yet the local Police Court Judge approved the issuance of the warrant after a cursory consideration. It is Rosenbarger's contention that the acts of the officers in securing and executing the search warrant were violative of the rights granted him under the Fourth Amendment provision of the Constitution of the United States.

Moreover, the petitioner believes that the Congress, by its enactment of 18 U.S.C., Appendix §1202, has overly extended the meaning of interstate applicability by providing, in effect, that guns in the possession of convicted felons and others defined by the statute, never cease to have an interstate character for pur-

poses of allowing continuous federal jurisdiction for prosecutions.

WHEREFORE, the petitioner submits that the questions presented by this Petition are of such importance to the proper administrations of justice that this Court should accept jurisdiction and issue a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 75-1821

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN PRESTON ROSENBARGER, JR.,
Defendant-Appellant.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed June 23, 1976.

Before: WEICK, CELEBREZZE and LIVELY, Circuit Judges.

WEICK, Circuit Judge. In a three-count indictment the defendant-appellant Rosenbarger was charged with receiving and possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. App. § 1202(a)(1). His motion to suppress was denied and he was found guilty by the District Court on a written stipulation of facts. He was sentenced to eighteen months' imprisonment on each count of the indictment; the sentences on Counts 1 and 2 were to be served concurrently; the sentence on Count 3 was to be served following the sentences on the other two counts; the length of the sentences imposed by the District Court was three years. Rosenbarger is free on bond pending the resolution of his appeal.

In his appeal Rosenbarger contends that § 1202(a)(1) is unconstitutional and that the District Court erred in

denying his motion to suppress evidence. In addition, by order of this Court the parties were directed to submit briefs on the issues of the propriety of charging three separate violations of § 1202(a)(1) under the facts of this case, and of the permissibility of imposing consecutive sentences even if prosecution on three separate charges were permissible.

I

Rosenbarger's challenge to the constitutionality of 18 U.S.C. App. § 1202(a)(1) is without merit. *United States* v. *Day,* 476 F. 2d 562 (6th Cir. 1973). *See United States* v. Bass, 404 U. S. 336, 350-51 (1971); *United States* v. *Bush,* 500 F. 2d 19 (6th Cir. 1974); *United States* v. *Brown,* 472 F. 2d 1181 (6th Cir. 1973). In his stipulation of facts to the District Court[1] Rosenbarger "acknowledge[d] that the firearms had previously traveled in interstate commerce as they had not been manufactured in Kentucky." Despite his concern with what he regards as an unprecedented extension of federal power, we have previously held that such a nexus with interstate commerce is sufficient to establish a crime punishable by Congress. *United States* v. *Day, supra,* at 569.

We decline to depart from that position. We hold that 18 U.S.C. App. § 1202(a)(1) in the factual context of this case is constitutional.

II

Rosenbarger was charged in the indictment with possession of three guns found during a search of his home. A warrant for that search had been issued by a Judge of the Police Court in Louisville, Kentucky. The warrant was based on an affidavit executed by Detective Ken Mooney

[1]Rosenbarger does not challenge the accuracy nor the voluntariness of this stipulation.

of the Louisville Police Department. In his affidavit Detective Mooney recounted information that he had received from Detective Glen Wood of Bowling Green, Kentucky. According to Mooney's affidavit, on January 6, 1975 Wood had received from Joann Martin a written statement which stated that she and her husband sold to Rosenbarger certain stolen goods on December 18, 1974.[2] In his affidavit Mooney stated that there was probable cause to believe that stolen property and property used as the means of committing a crime were in the Rosenbarger home. The following items were described in the warrant as the items to be seized pursuant to the search:

> One 12 Ga. Double Barrell [sic] Ithaca shot gun, One 22 Magnum Rifle Brand Mossberg, One homelite chain saw, Assorted hand guns various makes and calibers. Marijuana and/or Narcotics or Dangerous Drugs.

The affidavit of Detective Mooney also recited that the above items were verified as stolen, by Detective Wood

[2]In pertinent part Mooney's affidavit provided:

> On the 8th day of January, 1975, at approximately 1600 p.m., affiant received information from a law enforcement officer Detective Glen Wood, Commonwealth Investigator, Bowling Green, Kentucky, who states that an informant, Jo Ann Martin, W/F 28, 2229 Sunset Drive, Paducah, Kentucky, on 1-6-75 gave him a written statement that on 12-18-74 around 1200 noon, she, along with Leland Martin, W/M 34, went to Rosie's Tavern, 742 E. Market Street, Louisville, Kentucky, where they made contact with one John Preston Rosenbarger, W/M 38. From this location they were taken to 107 Stevenson, Louisville, Ky. When they arrived they sold the before mentioned items in this warrant to John Rosenbarger. Rosenbarger paid Leland Martin $50.00 in cash, and also wrote him a check for $50.00 on the stockyard Bank, Louisville, Ky., for the purchase of the stolen articles. Det. Wood states that the above mentioned informant also states that Rosenbarger deals in weed (marijuana) and other narcotics and drugs.

from theft reports on file in Bowling Green, Kentucky Police Department.

Joann Martin's (the informant) written statement of January 6, 1975[3] to Detective Wood stated that she and and a saw to a man named Johnny Rosenberg. Her statement described the stolen items sold in Louisville as follows:

> 1. Power saw yellow—with the name McCullen [sic] 250 on it. 1. Color TV 21 in. Console with leg that screw off legs.[4] Three Shot Guns I think they were a 12 Gage [sic], 16 Gage I don't remember the other one

Detective Mooney was not provided with a copy of Joann Martin's statement prior to his execution of the affidavit in support of the warrant.

The search warrant was issued and executed on January 8, 1975; Rosenbarger was not at home at the time the warrant was executed. The officers found a Titan .25 caliber semi-automatic pistol, a Hawes .357 Derringer, a .45 caliber Commando Mark III semi-automatic rifle, a McCulloch chain saw, and some pills described as positive amphetamines.

We conclude that there was probable cause for the issuance of the warrant to search Rosenbarger's home. The affidavit in support of the warrant contained information from an identified informant implicating herself in criminal activity. Such a declaration against penal interest carries

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[3]The statement of Joann Martin is dated January 6, 1974; however, it is clear from the transcript of the hearing on the motion to suppress that the statement was made on January 6, 1975.
her husband had come to Louisville and had sold three guns

[4]The television set was not sold to Rosenberg, but to another party in Louisville according to the statement of Joann Martin. Prior to issuance of the search warrant the television had been recovered by Detective Wood. According to his testimony at the hearing on the motion to suppress, the recovery of the television led him to believe that the rest of her statement was true.

its own indicia of reliability. *United States* v. *Harris*, 403 U. S. 573 (1971).

In addition, the statements of Joann Martin were verified by independent police action consisting of an examination of theft reports to the police from those locations at which Martin stated the robberies took place. We are of the opinion that the failure to specify in the search warrant the serial numbers of the stolen guns is not fatal to a showing of probable cause. *See Quigg* v. *Estelle*, 492 F. 2d 343 (9th Cir.), *cert. denied*, 419 U. S. 848 (1974). Further, the error in the affidavit as to the brand name of the saw was harmless.[5]

The use by the police of their knowledge of Louisville affairs in concluding that the "Johnny Rosenberg" described by Joann Martin was in reality Johnny Rosenbarger, does not invalidate the search warrant. The information as to Rosenbarger's reputation, which information led the police to identify Rosenbarger from the description of one "Johnny Rosenberg," ideally should have been stated in the affidavit for the warrant; however, we decline to invalidate the search warrant on the basis of this minor failure relating to the proper spelling of a name.

Appellant contends that the time lapse between Joann Martin's observation of the illegal activity on December 18, 1974 and the issuance of the warrant on January 8, 1975 is fatal to the validity of the search warrant. The assertion is that the information was too stale to serve as the basis for a finding of probable cause. First, we note that great deference is due to a determination of probable cause made by a judicial officer. *United States* v. *Olt*, 492 F. 2d 910, 912

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[5]A McCulloch brand saw was found in Rosenbarger's home, and Martin's written statement specified that a "McCullen" chain saw was sold to Rosenberg. However, the warrant and the affidavit in support thereof stated that the brand of the chain saw was "Homelite".

(6th Cir. 1974); *Irby* v. *United States*, 314 F. 2d 251, 253 (D.C. Cir.), *cert. denied*, 374 U. S. 842 (1963).

Although it is clear that probable cause existing at some time in the past will not suffice for the issuance of a search warrant, circumstances may be established from which it may be inferred that grounds for the search continued to the time the affidavit was filed. *See Sgro* v. *United States*, 287 U. S. 206 (1932).

We conclude that under the facts of this case an inference that the stolen property remained in the Rosenbarger home was proper. The assumption that stolen goods delivered to a particular place will be there a mere twenty-one days later is eminently reasonable. We conclude that the Police Judge could properly determine that there was reasonable probability that the goods remained in the Rosenbarger home. *See United States* v. *Rahn*, 511 F. 2d 290 (10th Cir. 1975), *cert. denied*, ___ U. S. ___ (1976), (facts relied on for issuance of search warrant were nearly two years old; validity of warrant upheld); *United States* v. *Barfield*, 507 F. 2d 53 (5th Cir.), *cert. denied*, 421 U. S. 950 (1975), (40-day interval between observation of stolen property on defendant's premises and issuance of warrant insufficient to invalidate the warrant). *But see United States* v. *Neal*, 500 F. 2d 305 (10th Cir. 1974), (information as to incriminating evidence on premises to be searched was obtained three months prior to search).

Appellant Rosenbarger raises one final issue with regard to the validity of the search warrant. Both the warrant and Detective Mooney's affidavit in support of that warrant specified that the scope of the search was to include "Assorted handguns various makes and calibers." However, Joann Martin's statement contained no indication that she had any knowledge as to the presence of handguns in Rosenbarger's home. At the hearing on the motion to suppress,

Detective Mooney testified that he received the information from Detective Wood as to the presence of handguns and rifles on the premises, and that the information regarding the handguns and rifles came from Joann Martin. Thus the inclusion of handguns in the affidavit and warrant was the result of using hearsay information furnished by Detective Wood.[6]

We are unwilling to overrule the determination of the magistrate who issued the search warrant, in the absence of proof that Mooney knowingly used a false statement with intent to deceive the court, or recklessly asserted a false statement necessary to establish probable cause. *United States* v. *Luna*, 525 F. 2d 4 (6th Cir. 1975), *cert. denied*, March 22, 1976. The following language from our opinion in *Luna* is instructive:

> . . . [W]e do not believe that good faith error in a carefully prepared search warrant affidavit should be held to require suppression of evidence even where the erroneous allegation was essential to establishment of probable cause. (*Luna, supra* at 9)

We apply that rule in the case at bar and hold that there is no basis for suppression of the weapons seized in the search of Rosenbarger's home.

III

The consecutive sentences imposed by the District Court as a result of Rosenbarger's conviction on three separate counts of receiving and having in his possession a firearm in violation of § 1202(a)(1) presents squarely before us the issue of whether the Government may treat each weapon

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[6]There is no question but that hearsay may serve as the basis for the issuance of a warrant. *Jones* v. *United States*, 362 U. S. 257, 269 (1960).

simultaneously possessed by a felon as a separate offense.[7] *See United States* v. *Burkhart*, ____ F. 2d ____ (6th Cir. 1976, No. 74-1871, decided Jan. 29, 1976.)

We are of the opinion that only one offense is charged under the terms of § 1202(a)(1) regardless of the number of firearms involved, absent a showing that the firearms were stored or acquired at different times or places. This view is premised upon the notion that Congress, and not the Courts, should define the criminal activity which is sought to be punished. *United States* v. *Bass*, 404 U. S. 336 (1971).

Thus, when a statute is ambiguous as to the appropriate unit of prosecution, that ambiguity should be resolved in favor of lenity for the accused. *Bell* v. *United States*, 349 U. S. 81 (1955). This assures that the particular criminal statute provides fair warning as to what is actually prohibited.

We have concluded that § 1202(a)(1) is ambiguous as to the appropriate unit of prosecution. It provides in pertinent part as follows:

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[7]The Government contends that Rosenbarger was convicted only of "receipt" of firarms in violation of § 1202(a)(1). This contention is based on the nexus with interstate commerce. It was stipulated by the defendant that the firearms had previously traveled in interstate commerce as they had not been manufactured in Kentucky. We have recently decided that a nexus sufficient to support a conviction for receipt of a firearm will also support a conviction for possession after receipt. *United States* v. *Jones*, ____ F. 2d ____ (6th Cir. 1976, No. 75-1817, decided March 30, 1976). See *Barrett* v. *United States*, ____ U. S. ____ (1976, No. 74-5566, decided Jan. 13, 1976, 44 U.S.L.W. 4050). Thus the conclusion that the nature of the nexus with interstate commerce which was stipulated establishes that defendant was convicted only of receipt of the specified weapons, is unwarranted. The arrest warrant, the complaint, the indictment, the defendant's stipulation of facts, and the judgment and conviction order all indicate that the contemplated charge against Rosenbarger included possession of the weapons. Most significantly, the indictment charged that Rosenbarger "did receive and have in his possession" the specified firearms.

> (a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . .
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

If Congress had desired to create a separate offense on the basis of each firearm possessed, this could have been easily written into the statute.[8]

We thus adopt the position expressed by the Seventh and Eighth Circuits in *United States* v. *Calhoun*, 510 F. 2d 861, 869 (7th Cir.), *cert. denied*, 421 U. S. 950 (1975), and *United States* v. *Kinsley*, 518 F. 2d 665 (8th Cir. 1975). *See McFarland* v. *Pickett*, 469 F. 2d 1277 (7th Cir. 1972); *United States* v. *Carty*, 447 F. 2d 964 (5th Cir. 1971); *Rayborn* v. *United States*, 234 F. 2d 368 (6th Cir. 1956).

The Government attempts to justify the imposition of consecutive sentences by establishing that Rosenbarger was convicted of receipt of the guns and that therefore the following language from *United States* v. *Steeves*, 525 F. 2d 33, 39 (8th Cir. 1975), controls:

> . . . [I]f a convicted felon receives a firearm on one occasion and later receives another firearm on another occasion, he is guilty of two offenses assuming that prior to the respective receipts the two guns had moved in interstate commerce.

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[8]See *Sanders* v. *United States*, 441 F. 2d 412 (10th Cir.), *cert. denied*, 404 U. S. 846 (1971), in which the use of the article "a" in 26 U.S.C. § 5861(d), making it unlawful to "receive or possess *a firearm* which is not registered to him in the National Firearms Registration and Transfer Record" [emphasis added], was held to render the unit of prosecution unambiguous.

As noted *supra* in footnote 8, we reject the contention that Rosenbarger was convicted only of a receipt of the firearms. Regardless, it was the Government's burden to establish separate offenses under the statute. Rosenbarger stipulated only the facts; he made no implicit or explicit stipulation as to the legal effect of those facts. To allow the Government on remand to submit additional proof as to the separate receipt of the weapons would violate the prohibition against double jeopardy contained in the Constitution. The Government had its opportunity to try the defendant for the offenses he committed, and it was able to establish only one violation of § 1202(a)(1) by virtue of defendant's possession of three firearms.

The Government maintains that Fed. R. Crim. P. 12 should be applied in this case. Rule 12 provides, *inter alia*, that if the defense of multiplicity is not raised prior to trial, it is waived. The argument that one waives his right to object to the imposition of multiple sentences by his failure to object to the multiplicitous nature of an indictment is a *non sequitur*. Rule 12 applies only to objections with regard to the error in the indictment itself; the effect of Rule 12 is that dismissal of a multiplicitous indictment is not required; however, if sentences are imposed on each count of that multiplicitous indictment the defendant is not forced to serve the erroneous sentence because of any waiver.

Rule 35 provides that in such a case the defendant may move that his sentence be corrected. *See* 1 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 145 at 335-36.

Finally, we note that since the defect in the sentence is apparent from the record, it is proper for this Court to resolve the issue on direct appeal rather than to wait for defendant to file a Rule 35 motion as "[i]t is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral

proceeding." *Bartone* v. *United States*, 375 U. S. 52, 54 (1963); 2 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 583 at 563.

We affirm the judgment of conviction and sentence on Count 1 of the indictment. We vacate the judgments of conviction on Counts 2 and 3.